IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1192

GINSBURG, FELDMAN & BRESS,
Petitioner,

v.

DEPARTMENT OF ENERGY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner seeks certiorari for two reasons: first, because this case raises important, unresolved issues of federal law; second, because it presents conflicts among the circuits and with decisions of this Court. Respondent fails to discuss (apparently it concedes) petitioner's first contention. Its contentions in opposition to petitioner's second reason for granting the writ are not persuasive.

1. Respondent admits that the courts have used various conflicting rationales in deciding issues similar to those in the case at bar. This, of course, respondent must do, for rarely has this Court been presented with such divergent,

irreconcilable rulings concerning an important area of federal law, many of which disregard clear statutory language. Even if only conflicts in rationales were involved, this Court should decide the case to settle these troublesome, litigation-producing uncertainties.

Respondent, however, also contends that the "results" the courts have reached are not inconsistent and that there are thus no significant conflicts which warrant granting the petition. Respondent states:

> Every court to have confronted this issue under the FOIA has reached the same result: while the theories the courts invoke vary, no court has ordered the release of investigatory manuals in circumstances where public knowledge of administrative procedures or standards would allow the circumvention of agency regulation. Br. at 5.
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> [A]lthough there may be differences in approach among the courts of appeals, no court of appeals has ordered the release of law enforcement guidelines like those involved here. Br. at 7.

These statement are either in error or misleadingly imprecise. In *Jordan v. United States Department of Justice*, No. 77-1240 (D.C. Cir. Oct. 31, 1978) (*en banc*) the court ordered release of documents it found to be "law enforcement manuals" (slip op. at 12) despite an affidavit from the United States Attorney for the District of Columbia which asserted that disclosing the requested documents — prosecutors' manuals used in determining, among other things, which cases to prosecute — would have, in the court's term, "pernicious consequences."

> Public disclosure of these materials would alert members of the public to those situations, persons, and offenses for which prosecution is

> withheld, selectively applied, or disposed of by pre-trial diversion. Individuals could then successfully exploit these policies by committing crimes within these select categories, thereby escaping prosecution. For example, publication of a policy of non-prosecution (or prosecution at a lesser degree of seriousness) for possession of certain quantities of specific narcotic drugs would serve only to encourage dealers and users of narcotics to carry lesser quantities of the drug than those specified in our guidelines. A similar result would obtain if our internal guidelines regarding monetary tolerances (Property value theft minimums used in larceny cases to determine whether prosecution is warranted) were released since an offender could avoid full prosecution merely by stealing property valued at less than our *de minimus* standards. Obviously, the revelation of this kind of information would serve no legitimate public purpose and would ultimately result in the rescission of many of these guidelines and termination of our FOT program. Slip op. at 9-10[1]

[1]These assertions are seriously at odds with respondent's present statement (Br. at 8) that "[s]ince the [*Jordan*] guidelines came into play only after arrest, there was little danger that disclosure of the documents would enable potential lawbreakers to circumvent the law." Also inconsistent is the district court's statement in *Sturgeon v. Department of Treasury*, No. 77-1961 (D.D.C. Jan. 30, 1970), that "[t]he material sought in *Jordan* would not help defendants evade detection or apprehension; it would merely help their lawyers do a better job for them." Slip op. at 5. The district court's reading of *Jordan* is still another example of the confusions and contradictions that plague this area of the law.

The court said that "[t]hese arguments have much merit" (slip op. at 57-58), but nonetheless released the manuals, stating:

> [A]s our analysis of the statutory language of Exemption 2 and its legislative history demonstrates, Exemption 2 was not designed to protect documents whose disclosure might risk circumvention of agency regulation, whatever would be the merits of such a provision. Exemption 2 is much more limited, as we have described. Slip op. at 38.

Compare further, Sladek v. Bensinger, No. C-76-1678-A (N.D. Ga. Sept. 2, 1977), *appeal docketed*, No. 77-3247 (5th Cir. Nov. 10, 1977) and *Cox v. Department of Justice*, 576 F.2d 1302 (8th Cir. 1978), which reached different conclusions concerning the *same* DEA agents manual.

2. Respondent's unwillingness to discuss petitioner's first reason for certiorari — that this case raises significant, unsettled issues of law concerning a much used federal statute — is not surprising. Respondent cannot deny that in fact such issues are raised. Petitioner cites numerous cases where federal courts have sought to determine whether federal law enforcement materials must be released under the FOIA. Petition at 7-8. Two additional cases involving this difficult issue have been decided since the petition was filed. *Cox v. Levi*, No. 77-1213 (8th Cir. Feb. 13, 1979); *Sturgeon v. Department of Treasury*, No. 77-1961 (D.D.C. Jan. 30, 1979). If this Court does not resolve the important questions here presented — including those expressly left open in *Department of the Air Force v. Rose*, 425 U.S. 352, 363-64, 369 (1970) — cases of this sort will continue to burden the federal courts and conflicting opinions, such as described in the petition, will proliferate. Because the lower courts are unable to deal with these issues in a consistent, coherent manner, this Court should settle them. Given the

confused state of the law, it is unrealistic to expect, to use respondent's words (Br. at 9), that the differences among circuits "may be clarified by the courts in pending cases."[2]

3. Respondent now contends (Br. at 2) that the FOIA sections relevant here are (a)(2)(C) and (b)(2). But any suggestion that (a)(2)(C) constitutes an appropriate basis for the court of appeals' judgment runs afoul of various decisions of this Court which hold that the eight exemptions found in FOIA section (b) are "exclusive", and that records must be produced unless protected by a specific exemption. *Department of the Air Force v. Rose*, 425 U.S. at 360-61; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975); *EPA v. Mink*, 410 U.S. 73, 79 (1973). As the *Jordan* case makes clear, section (a)(2)(C) is neither an exemption nor a valid independent ground for nondisclosure. Slip op. at 13-17[3] Respondent ignores petitioner's argument that the court of appeals' decision in *Ginsburg* may conflict with decisions of this Court.[4]

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[2]That the court of appeals in *Ginsburg* was unable to write an opinion is reason to grant the petition, not cause to deny it, for it shows that the circuit having the highest volume of FOIA litigation is unable to cope with the questions presented.

[3]However, the Eighth Circuit's recent opinion in *Cox v. Levi* reaffirms that court's position that (a)(2)(C) provides a separate basis for withholding.

[4]Petitioner does not contend, as respondent asserts (Br. at 5), that this Court "should grant review because there is an inconsistency in the legislative history concerning the proper interpretation of Exemption 2." It does contend that this case presents conflicts among the circuits and with decisions of this Court.

The petition should be granted because this case raises important, unresolved issues of federal law and presents conflicts among the circuits and with decisions of this Court.

Respectfully submitted,

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